

AFRICAN NATIONAL CONGRESS

DEPARTMENT OF LEGAL AND CONSTITUTIONAL AFFAIRS
P.O. Box 31791, Lusaka, Zambia. Telephone 219656/7 Telex 45390

Our Ref:

4th June, 1987.

Your Ref:

Cde Thabo Mbeki

DIP ANC(SA)

Lusaka.

Dear Cde Thabo

Re: Walter Sisulu and Others Memorandum

We have had occasion to study the memorandum sent to the Movement by Priscilla Jana and Associates and following hereunder are our observations.

We believe that while it would be erroneous merely to regard this proposal as yet another exercise in futility, for the following reasons it would not be advisable for the Movement to lend its support to it:

1. Political Embarrassment to the Movement

There are two possibilities in this regard, namely that

- (a) The regime may refuse to use its discretion under the Prisons Act unconditionally (which evidently is its position) and this may mean that the Movement is grovelling at the feet of the regime as it were, for the release of our leaders.
- (b) The regime may, using the court, concede the release of the leaders the lawyers had consultations with and place certain conditions. This may give the regime a pretext to release them and enable it to avoid the worldwide campaign for the unconditional and immediate release of all political prisoners it is holding, including Comrade Nelson R. Mandela. Their conditional release would embarrass them as well after their well known refusal to commit political harakiri by renouncing the armed struggle.

2. Whereas we have consistently called and campaigned for the unconditional release of all political prisoners incarcerated in the gaols of the Pretoria regime, including Cde N.R. Mandela, he is not one of the leaders held with whom the lawyers consulted on this issue. Besides, there are many more of our people's leaders and comrades held illegally by the illegitimate regime, and to single out only a few may not be easily understood by the people and also politically embarrassing.

3. The approach of the lawyers is also rather too legalistic. It tends:

- (a) to overlook the struggle in the context of which our leaders and comrades were arrested and gaoled by the regime;
- (b) to overlook the worldwide campaign for the unconditional release of all political prisoners; and

(c) to ignore the fact that our leaders and comrades have all refused to commit political suicide by renouncing the armed struggle which they themselves initiated.

4. The legalistic approach of the lawyers also tends to accord a semblance of legitimacy to the apartheid colonial regime, and says:

on Pages 13 and 14 of the lawyers' memorandum that

"It would have been perfectly lawful, even on this argument, for the State President to have authorised the release of the prisoners concerned on probation or on parole on the condition that they should not, upon their release, advocate, encourage or aid violence as a means of affecting political change.", and "if any of the prisoners, upon their release, had thereafter acted in breach of this condition, they could properly have been returned to the prison. Indeed, it might even be that the State President could validly have imposed a condition in terms of the Prisons Act to the effect that, upon their release, each of the prisoners concerned had to make a public declaration renouncing or forswearing violence as a means of political change and again, if that condition was breached, the prisoners concerned could have been returned to gaol. The argument is not that the objective sought to be achieved by the State President was unlawful; the argument is simply that the legal means chosen by him to achieve the lawful objective were technically defective and unauthorised by the Act."

On page 17 they further say:

"The prisoners in the present case have had their liberty curtailed for nearly a quarter of a century, albeit on lawful grounds."

We cannot imagine a worse attempt than this to eviscerate the worldwide campaign for the unconditional release of all the political prisoners. Besides, the argument of the lawyers in its totality strikes at the very core of the policies of the Movement, namely that the apartheid regime is illegitimate in that it does not draw its authority from the will of all South Africans.

5. The proposal of the lawyers is based on the statement made by P.W. Botha in January 1985 and the notices given to our leaders by the regime subsequent to that statement. That statement cannot by any stretch of the imagination be regarded as an unequivocal offer of release, and was never interpreted as such even by the supporters of the regime. An example of an unconditional release of a political prisoner of this category in particular was the release of Cde Toivo Ja Toivo, to which Cde Nelson Mandela referred when declining P.W. Botha's conditional offer of release.

We cannot allow the lawyers to place the fate of our leaders in the hands of the Pretoria regime. The leaders the proposed application is about are not mere political prisoners but founders of our people's army, Umkhonto We Sizwe, a fact/factor that should not be overlooked, especially in the current set up in our country. We cannot afford to be seen to be pleading with the regime, even before its courts, for the conditional release of any of them. Their release should come as a consequence of the efforts of the masses of our people to rid themselves of apartheid colonialism.

6. As the lawyers themselves point out on Page Two of their memorandum, there does not seem to be any automatic right vesting in a prisoner to demand that the regime should use its discretion and release him/her at any particular moment. Even if the court can find that the condition imposed by the apartheid regime, namely the renunciation of violence before the release of our leaders, was indeed unlawful, we cannot see how, under the laws of the regime, the court can order the regime to use its discretion, (which it can "lawfully" refuse to use) and release our leaders even conditionally.

The other question is at whose instance the lawyers seek to move the application? Will this not be interpreted to mean that when Cde Nelson Mandela declined the conditional offer of release, he was not representing the rest of the leadership in gaol? Is there not a possibility that the lawyers involved are seeking to enhance their prestige and also make material gains out of the exercise? These and other questions are raised in the light of certain practices and tendencies and commercialisation among lawyers in South Africa that are inimical to our struggle.

We would recommend that, should the leadership see any merit in the proposed application, the issue should be thoroughly discussed and canvassed with our people before the action is sanctioned. The case is more political than legal and this should be emphasised when the lawyers are approached again in this regard.

Summary

1. The whole legal opinion is too legalistic and over optimistic. It tends to assume that P.W. Botha's sense of justice will prevail over the political character of the case in question, in spite of the numerous statements by the regime on conditional release of the leaders and the whole political nature of the case.

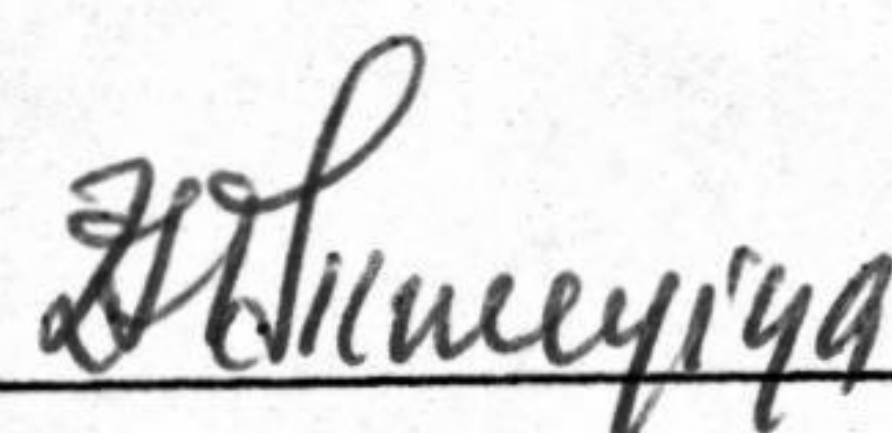
2. The experience of the ANC and the democratic movement in South Africa is that the regime only respects the decision of its courts only when it suits it. One can easily quote the removal of the Coloured people from the voter's roll as an example, when the regime took measures to subvert the decisions of the court in order to enforce its political will.

It is rather doubtful whether in this case, it will respect the decisions of the court especially now when the political environment both inside and outside South Africa is not in its favour.

3. Our argument above demonstrates beyond any reasonable doubt the political nature of the brief in question. If the Counsel is allowed to continue in his brief, he will be watering down the political argument of our leadership in Rivonia and afterwards whose tenets were aimed at exposing the illegitimacy of the regime, that it was undemocratic and criminal, hence the justness of all forms of resistance to it including armed struggle.

What scares us most, is that the whole exercise might strike at the base of both the national and international campaign to release Nelson Mandela and all political prisoners. The lawyers concerned might be taking a short cut which might prove to be politically expensive both to the Rivonia Trial leaders and to the Movement as whole.

In the Year of Advance to People's Power!



Zola S.T. Skweyiya

Chairperson

cc The President - Cde OR Tambo

The S.G. - Cde A. Nzo

P.M.C. - Cde J. Jele

E.C.C. - Cde J. Stuart.

NEC Secretariat - Cde P. Jordaan

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